

Open Meeting Law

Town of Lunenburg

May 14, 2013

Presented by Joel B. Bard, Esq.



KOPELMAN AND PAIGE, P.C.



THE LEADER IN MUNICIPAL LAW
ATTORNEYS AT LAW

All materials © Copyright 2013 Kopelman and Paige, P.C. All rights reserved.

Disclaimer

- This information is provided as a service by Kopelman and Paige, P.C. This information is general in nature and does not, and is not intended to, constitute legal advice. Neither the provision nor receipt of this information creates an attorney-client relationship between the presenter and the recipient. You are advised not to take, or to refrain from taking, any action based on this information without consulting legal counsel about the specific issue(s).

Overview of Presentation

- Introduction to the “New” Open Meeting Law
- What Discussions are Subject to the Law
- E-mail Communications
- Meeting Notices
- Conducting the Meeting
- Executive Sessions
- Minutes
- Enforcement by the Division of Open Government



Open Meeting Law ("OML")

- **Basic Facts**
 - Open meeting, public records and conflict of interest laws (sometimes referred to as “sunshine laws”) exist in virtually every state
 - Purpose of such laws is to eliminate much of the secrecy surrounding deliberations and decisions on which public policy is based
- **MA OML (G.L. c.30A, §§18-25)**
 - In Massachusetts, the OML was revised as part of the 2009 Ethics Reform Bill (replaced OML G.L. c.39, §§23A-23C)
 - Effective July 1, 2010



The “New” OML

- Centralizes oversight and enforcement in Attorney General’s Office – Division of Open Government or “D.O.G”
- Alters and inserts important statutory definitions
- Imposes requirements for and regulates meeting notices, minutes, executive sessions, exemptions, member participation and related administrative matters



Certification

- Must be done within 2 weeks of qualification for office
- Form prescribed by AG
- Acknowledge receipt of:
 - OML
 - Regulations promulgated by AG (pursuant to G.L. c.30A, §25)
 - Educational materials prepared by AG’s office (pursuant to G.L. c.30A, §19)



Definition: Meeting

- “[A] **deliberation** by a **public body** with respect to any matter within the body’s jurisdiction...,” with certain express exceptions.



Definition: Meeting (cont.)

- Specifically excludes:
 - A quorum at an on-site inspection so long as members don’t deliberate
 - Attendance by a quorum at a conference or training program or a media, social or other event so long as members don’t deliberate
 - Attendance by a quorum at meeting of another governmental body that has complied with the notice requirements of the OML so long as the visiting members communicate only by open participation in the meeting of those matters under discussion by host body as would others, and do not deliberate
 - A meeting of a quasi-judicial board held for the sole purpose of making a decision in an adjudicatory proceeding (State bodies only)



Definition: Meeting (cont.)

- Practical Considerations when quorum of public body intends to go to meeting of another board, or discovers upon arrival that a quorum is present:
 - Post later meeting of board or committee if members anticipate that they might want to discuss matters amongst themselves or respond to matters raised
 - Do not drive to meeting together, sit together, or talk to each other during the meeting
 - If a member wishes to speak, should be clear that the member is not representing the public body, but instead speaking as an individual
 - Post “joint” meeting to be held at same time and place



Meeting (cont.)

- In OML 2012-69, the Carver School Committee was found to have violated the OML where a quorum of the Committee stepped outside a meeting of the Board of Selectmen to discuss an alternative to a ballot question relating to funding a school project.



Definition: Deliberation

- “[A]n oral or written communication through any medium, including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction...,” with certain express exceptions.



Definition: Deliberation (cont.)

- Specifically includes e-mail communications
- **Provided that no opinions of governmental body are expressed,** specifically excludes:
 - Distribution of meeting agenda
 - Scheduling information
 - Distribution of other procedural meeting materials, reports or documents that may be discussed



Deliberation, cont.

- In OML 2012-93, the AG found that one individual member of the Stow School Building Committee violated the OML by e-mailing a quorum of members asking for comments on a power point. The committee members responding did not violate the law, according to the AG, because they did not “reply to all”.

Deliberation, cont.

- In OML 2013-01, the AG acknowledged that “it can be difficult to determine when a communication serves an administrative function and when it contains substantive discussion in violation of the law. Our best advice continues to be that public bodies not communicate over e-mail at all except for distributing meeting agendas, scheduling meetings, and distributing documents created by non-members to be discussed at meetings.”

Deliberation, cont.

- Practical considerations for board members include:
 - Don't ask for or express opinions, ideas, beliefs in an e-mail to other members
 - Never click on "reply to all"
 - Limit use of e-mail to scheduling purposes, and try to avoid using e-mail to undertake Town business
 - Assume that e-mail may be forwarded to unintended recipients, and therefore limit content to business matters; be prepared to read e-mail in local newspaper or blog

Definition: Public body

- "[A] multiple-member board, commission, committee or subcommittee within the executive or legislative branch or within any county, district, city, region or town, however created, elected, appointed or otherwise constituted, established to serve a public purpose; ...and provided further, that a subcommittee shall include any multiple-member body created to advise or make recommendations to a public body."



Definition: Public body (cont.)

- **Subcommittee** - any multiple-member body created to advise or make recommendations to a public body
- Excludes committees or subcommittees appointed by sole officer who has authority to act independently, i.e., the so-called “Connelly Rule”



Definition: Public body (cont.)

- In OML 2012-28, the AG found that a Bylaw Review Committee consisting of seven members, including the Town Administrator, Town Clerk, Building Inspector, Town Planner, Conservation Agent, Director of Public Health, Police Chief and Superintendent of Public Works were a subcommittee subject to the OML because they were created by a vote of the Board of Selectmen.
- AG specifically found that the **same group would not be subject to the OML if assembled by the Town Administrator.**



Scheduling Meetings: Notice

● Timing:

- Requires notice to be posted at least 48 hours in advance of meeting, excluding Saturdays, Sundays and legal holidays

● Manner:

- Must be posted in manner conspicuously visible to the public at all hours in or on municipal building housing clerk's office; AG's regulations now allow posting on website; AG must be notified



Scheduling Meetings: Notice

● Practical Implications

- For a Monday meeting, notice must be posted on the preceding Thursday
- If Monday is a holiday, a Tuesday meeting must also be posted on the preceding Thursday
- If posting is made in an "alternate location", notice must be timely posted in both locations



Scheduling Meetings: Notice

- Practical Implications

- A meeting may not be continued from one night to the next unless the meeting is properly posted under the OML
- The notice required under the OML **does not substitute for or otherwise supersede** notice requirements under other applicable laws



Scheduling Meetings: Notice

- Emergency for purposes of OML:

- Threat to public health and safety
- Exception to 48 hour requirement; however, OML requires posting as soon as reasonably possible
- Practical recommendations:
 - Comply with the law to the extent possible
 - Limit deliberations to emergency matter
 - Take minutes of meeting, and review and include with minutes of next regularly scheduled meeting.
 - When posting emergency meeting, consider posting a regular meeting as well, to allow body to ratify the action taken at emergency meeting.



Scheduling Meetings: Notice

● Content of Notice:

- Notice shall include “a listing of topics that the chair reasonably anticipates will be discussed at the meeting”
- This requirement has been interpreted by the AG to mandate that the notice include a listing of the particular items to be discussed, rather than general topics of discussion; must be detailed



Scheduling Meetings: Notice

● Content of Notice:

- The AG's regulations include a requirement that the notice must have set forth thereon the date and time the meeting notice was posted, or that such information be posted “with” the notice;
- OML 2013-44 (Carver) imposes a further requirement that any revised meeting notice include both the time and date the meeting was originally posted, as well as the time and date the most recent revised notice was posted



Scheduling Meetings: Notice

Specificity Requirements:

- The general rule established by the AG is that the notice is sufficiently when a **reasonable member of the public can read the topic and understand the anticipated nature of the discussion.**
- E.g., OML 2011-15 (Melrose) – AG concluded that School Committee violated law by failing to include in notice of meeting name of non-union personnel with whom it would be negotiating.



Scheduling Meetings: Notice

- E.g., OML 2011-9 (Natick) –AG concluded that School Committee violated law by failing to include **specific details of proposed vote on Town Meeting warrant articles** where item simply listed “Town Meeting Update”
- AG recommended that notice should have said, **“Discussion of Town Meeting Warrant Articles 1, 9, 10, 18, 32, 33 and 35. The School Committee may vote to recommend action on these articles at Town Meeting.”**



Scheduling Meetings: Notice

- E.g., OML 2011-11 (Freetown) – AG concluded that notice for Soil Board hearing was deficient where it listed “Renewal of Fall Soil Permits”, as it reasonably anticipated that particular permits would be considered and “it should take the additional step of listing into the meeting notice the details of those specific permits, including the name of the applicant and the location under consideration.”



Scheduling Meetings: Notice

Practical Implications – Discussion of Matter Not on Notice

- If a matter does not appear on the meeting notice, and the Chair did not reasonably anticipate the matter would be discussed at meeting, the law does not prohibit consideration of same
- However, AG recommends that **unless matter requires immediate action, matter not appearing on meeting notice should be put off to later meeting for which posting includes matter**



Scheduling Meetings: Notice

- Practical Implications – Update Notice
 - If a matter is brought to attention of Chair after notice has been posted, to the extent feasible, meeting notice may be updated to include such matter - **useful to implement procedure/policy with respect to reasons and process for updating notice**
 - May not be possible to update if staff cannot reach Chair, and/or if Chair discovers matter shortly before meeting



Scheduling Meetings: Notice

- E.g., OML 5-4-11 (Sturbridge) AG stated that although Board of Selectmen did not violate law by discussing matter not listed on meeting notice (matter was raised by member of public and not reasonably anticipated), body was **“strongly encourag[ed] . . . not to consider topics that may be controversial or of particular interest to the public until the topic has been properly listed in a meeting notice in advance of a meeting.”**



Scheduling Meetings: Location

- Location of meeting **must be accessible**; required both by the OML and the ADA
- Practical considerations include:
 - Ability to meet in privately owned location
 - Moving meeting to different location (e.g., unanticipated attendance)
 - Closing door during open session



Scheduling Meetings: Location

- In OML 2012-46, the AG concluded the Melrose School Committee Superintendent Search Committee violated the OML where meeting was held in locked area of high school, and the public was unable to gain access once greeter “left”



Scheduling Meetings: Time

- Although the OML is silent with regard to the time that meetings must be held, in OML 2013-2, the AG “encourages” public bodies to schedule their meetings at a time that permits maximum attendance of public body members as well as the public.



Conducting Meetings: Public Session

- Practical considerations with public participation:
 - Allow? **NOT required by OML**
 - Beginning or end of meeting?
 - Controls – Practical Implications:
 - Protect individual rights
 - Don't try to resolve issues at time; consider adding issue as agenda item at future meeting
 - Avoid debate
 - Limit time per person and total time



Conducting Meetings: Public Session

- In OML 2012-48 the AG concluded that the West Brookfield Zoning Board of Appeals was not required to permit members of the public to participate in its meetings, and further that the Board was not required to accept petitions or agenda topics submitted by the public.



Conducting Meetings: Recording

- Under new OML, Chair must make public statement regarding audio or video recording if attendee intends to record (basis – MA wiretap statute)
 - If meeting will be recorded by cable access personnel, the same must be announced by the Chair
- Recording by individuals:
 - Must inform the Chair
 - Chair must make required announcement
 - Chair may reasonably regulate recordings (placement, operation of equipment)



Conducting Meetings: Remote Participation

- Prior to new OML, most District Attorneys interpreted OML as prohibiting remote participation by a board member
- Under new OML, remote participation okay if authorized by AG by regulation, which it has been, or letter ruling, as long as “chair” and quorum are physically present



Conducting Meetings: Remote Participation

- BOS must vote to allow Town boards to use, and any BOS policy applies to all boards; can impose additional limitations on use
- Quorum must be physically present
- Remote participants considered present and may vote
- Must be audible or visible to all in attendance
- May participate in executive sessions, provided that they certify that they are alone or that others cannot hear, or receive permission for others to be present.



Conducting Meetings: Executive Sessions

- New OML has changed the following with respect to executive sessions:
 - Process for going into executive session
 - Permissible reasons (exemptions to OML) for executive sessions
 - Required timeline for review and release of minutes



New Executive Session Requirement

- Before going into the executive session, the chair must state the purpose for the session, “**stating all subjects that may be revealed without compromising the purpose for which the executive session was called**”.
 - **Note that the AG interprets this standard as equally applicable to the form of meeting notice.**
- In OML 2012-118, the AG concluded that this includes the name of a case in litigation, if doing so would not compromise the litigation.
- The vote to go into executive session must still be by roll call vote and chair must indicate whether the body is returning to open session.



New Executive Session Requirement

- Practical Implications

- Public body must limit discussion in executive session to the matter(s) stated in the meeting notice (unless it was not reasonably anticipated by the Chair) and included in the vote to enter executive session



New Executive Session Requirement

- Practical Implications

- In OML 2012-39, the AG found that the Amherst-Pelham Regional School Committee violated the law by stating that it was entering executive session for “contract negotiations”, when it actually received an update on the status of collective bargaining negotiations.
- AG stressed that **the precise reason for entering executive session must be stated**, and that such action was not a “mere technical violation.”



New Executive Session Requirement

● Practical Implications

- In OML 2011-56, even though the complainant did not raise the issue, the AG found the Carver Board of Selectmen violated the law **by failing to specify the particular non-union personnel with whom it be negotiating**
- In OML 2011-54, the West Newbury Board of Selectmen met in executive session to receive and discuss written communications from Town Counsel, listing “legal matters” on the meeting notice; the AG found this violated the law, and at a minimum needed to specifically cite G.L. c.30A, §21(a)(3) – strategy with respect to litigation



Exemptions to OML – Executive Sessions

“(1) To discuss the reputation, character, physical condition or mental health, rather than professional competence, of an individual, or to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual. ...”

- **Adds** right of individual to create independent record of session at own cost
- Meeting notice and vote likely need **NOT** refer to name of individual to be discussed



Exemptions (cont.)

- In OML 2013-2, the AG acknowledged that exemption 1 allows public bodies to discuss reputation, character, etc. in executive session, but public bodies are not required to discuss such matters in executive session.
- In OML 2012-119, the AG ruled that public bodies may discuss the resolution of OML complaints in executive session under exemption 1 because such complaints are complaints brought against public officers.



Exemptions (cont.)

- “2. To conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel;
3. To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body **and the chair so declares ...**”
6. To consider the purchase, exchange, lease or value of real property **if the chair declares** that an open meeting may have a detrimental effect on the negotiating position of the public body



Exemptions (cont.)

- AG has found that OML requires that **collective bargaining contracts negotiated in executive session be approved or ratified in open session.** OML 2011-56 (Carver).
- However, the AG has not taken this position with respect to other matters determined in executive session.
- If entering executive session under exemptions 3 or 6, the public body cannot invite the “other side” to participate in the executive session. OML 2012-114 (Southampton).



Exemptions (cont.)

- To rely on **exemption (7)**, allowing a public body to enter executive session to comply with any general or special law or federal grant-in-aid requirements, **the public body must state on meeting notice and in vote to enter executive session the specific authority therefor.**
- Examples of such authority include statutes limiting disclosure of information such as G. L. c.6, §§167A and 172 (CORI), G.L. c.59, §60 (abatement applications), or others suggesting confidentiality is required, such as the personal privacy statute, G.L. c.214, §1B



Exemptions (cont.)

- To justify an executive session to discuss strategy with respect to litigation under exemption (3), the AG indicates that the “possibility” of litigation is not sufficient. Instead, litigation must be pending, clearly and imminently threatened or otherwise demonstrably likely.
- In OML 2012-116 (Nantucket), the AG found that it was **appropriate** for the Board of Selectmen and Planning Board **to meet in executive session to decide whether to appeal a decision of the ZBA.**



Exemptions (cont.)

- Practical considerations:
 - If executive session is anticipated, it must be listed in appropriate detail on meeting notice, with such specificity as is possible without compromising purpose of the session.
 - Related vote to enter executive session must also include all information possible without compromising purpose of session (i.e., name of non-union personnel or union must be identified in notice and vote if bargaining or negotiations will be conducted; case name to be discussed under litigation strategy must be listed, unless doing so would compromise Town’s position); **and declaration must be made, as needed**



Conducting Meetings: Minutes

- Must include:
 - Time, date, place, members present and absent
 - Summary of the discussions on each subject
 - Decisions made and actions taken, including a record of all votes
 - List of documents and other exhibits used by the body at the meeting, which will be “part of record” but not of minutes



Conducting Meetings: Minutes

- The minutes must include a summary of the discussions of each topic. While a transcript of the discussion is not required, **minutes must be sufficiently detailed to allow a person who was not in attendance to determine the essence of the discussion and what documents were used.**
- The same rule applies to executive session minutes.



Conducting Meetings: Minutes

- In OML 2012-101, the AG found that the Assessors' executive session minutes, stating only whether an abatement was granted, the amount of the abatement (if granted) and the vote, were not sufficiently detailed because there was no record of the discussion on each application.



Conducting Meetings: Minutes

- In OML 2012-42 the AG concluded that the Arlington Board of Selectmen violated the OML by failing to include a list of documents used at the meeting
- Established the following standards to determine if a document is “used”:
 - Document is physically present at meeting; and
 - Document is verbally identified; and
 - Content of document is discussed by members



Minutes (cont.)

- Open session meeting minutes “shall not be withheld under any of the exemptions to the Public Records Law”, except that the following materials are exempt as personnel information:
 - materials used in a performance evaluation of an individual bearing on his professional competence that were not created by members of the body for purposes of the evaluation; and
 - materials used in deliberations about employment or appointment of individuals, including applications and supporting materials and excluding resumes



Executive Session Minutes

- Must be disclosed when purpose of exemption has been met, **unless otherwise protected under the Public Records Law**
- Must be reviewed periodically by chair or public body;
- Must be provided within 10 days in response to request, unless review not yet undertaken, in which case **the minutes must be reviewed no later than the board's next meeting or 30 days, whichever occurs first**



Enforcement Process

● Filing Complaint

- Must first file written complaint with public body, within 30 days of alleged violation using form prepared by AG
- Public body must forward complaint to AG within 14 business days of receipt and inform AG of any remedial action taken
- Not less than 30 days after date complaint was filed with public body, complainant may file a complaint with AG



Enforcement (cont.)

- Public Body must consider complaint at properly posted meeting
 - Matter must appear on meeting notice
 - Body must acknowledge receipt of complaint
 - Should deliberate concerning allegations and possible resolution
 - Vote to resolve complaint
 - If appropriate, authorize response to be prepared and sent to Attorney General and Complainant



Enforcement (cont.)

Remedial action may include:

- making minutes of improperly called or held executive session public by including them as an addendum to minutes at a properly called meeting, or filing with Town Clerk
- creating minutes if the same were not properly created, or supplementing minutes if they were not sufficiently detailed
- providing for public deliberation and voting on matters considered at an improperly called or held meeting



Enforcement (cont.)

- If public body cannot act to respond to complaint within statutory time frame, or if such action would be difficult based upon particular circumstances, an extension of the time to respond may be requested
- To ensure that such request is viewed in a manner most favorable to the public body, extension request should be requested before expiration of statutory response time



Enforcement (cont.)

● Cure:

- Consistent with prior case law, the AG recognizes: “Public deliberation (at a properly posted open meeting) effectively cured the private discussion which occurred over email because it enabled the public to see the discussion that went into the creation of the policy. To cure a violation of the Open Meeting Law, **a public body must make an independent deliberative action, and not merely a ceremonial acceptance or perfunctory ratification of a secret decision.**” See OML 2011-14 (Wakefield School Committee)



Enforcement (cont.)

- Once a complaint is filed, the Attorney General must:
 - Determine whether there has been a violation
 - Hold a hearing before imposing civil penalty
 - In the event a violation is found, determine whether the public body, or one or more of its members, or both, are responsible, and whether the violation was intentional



Enforcement (cont.)

- In OML 2012-40, the AG determined that the Milford School Committee cured a violation of the OML, which occurred when a quorum deliberated outside a properly posted meeting, by raising the issue of the OML violation at the next meeting, explaining the nature of the violation, and recommending that the Committee reconsider its motion and vote at a later meeting after providing proper notice of the consideration of the subject



Enforcement (cont.)

- Upon finding a violation, the AG may issue an order to:
 - Compel immediate and future compliance with OML;
 - Compel attendance at authorized training session;
 - Nullify in whole or in part any action taken at meeting;
 - Impose civil penalty upon public body of not more than \$1,000 for each intentional violation;
 - Reinstate employee without loss of compensation, seniority, tenure or other benefits;
 - Compel that minutes, records or other materials be made public; or
 - Prescribe other appropriate action



Enforcement (cont.)

● Judicial Review of AG Order

- A public body or any member aggrieved by order may file certiorari action in Superior Court within 21 days of receipt of order
- AG order stayed pending judicial review
- If AG order nullifies action, public body shall not implement action



Enforcement (cont.)

● Compliance

- AG may file action in Superior Court to compel compliance with order or payment of civil penalty

● Alternative procedure

- AG or 3 or more registered voters may initiate civil action in Superior Court to enforce OML



Resources

Attorney General's Office:

<http://www.mass.gov/ago>

Attorney General's Open Meeting Law Website:

<http://www.mass.gov/ago/government-resources/open-meeting-law/>

Secretary of the Commonwealth Public Records Law:

<http://www.sec.state.ma.us/pre/preidx.htm>



Joel B. Bard, Esq.
Kopelman and Paige, P.C.
101 Arch St., 12th Floor
Boston, MA 02110
(617) 556-0007
www.k-plaw.com



KOPELMAN AND PAIGE, P.C.



THE LEADER IN MUNICIPAL LAW
ATTORNEYS AT LAW

All materials © Copyright 2013 Kopelman and Paige, P.C. All rights reserved.